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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/774,850	02/09/2004	Ronald A. Bement	BEM-0001	9513

27447 7590 11/25/2005

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EXAMINER	
ALIMENTI, SUSAN C	
ART UNIT	**PAPER NUMBER**
3644	

DATE MAILED: 11/25/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/774,850	BEMENT, RONALD A.	
	Examiner	Art Unit	
	Susan C. Alimenti	3644	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *01 September 2005*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *21-39* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *21-39* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

1. Applicant's election without traverse of the method of Group II in the reply filed on 01 September 2005 is acknowledged. The shift from the previously elected apparatus of Group I to the method of Group II is permitted, and prosecution on the merits of method claims 21-39 follows.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 26, 32 and 38 contains the trademark/trade name VELCRO®. Where a trademark or trade name is used in a claim as a limitation to identify or describe a particular material or product, the claim does not comply with the requirements of 35 U.S.C. 112, second paragraph. See *Ex parte Simpson*, 218 USPQ 1020 (Bd. App. 1982). The claim scope is uncertain since the trademark or trade name cannot be used properly to identify any particular material or product. A trademark or trade name is used to identify a source of goods, and not the goods themselves. Thus, a trademark or trade name does not identify or describe the goods associated with the trademark or trade name. In the present case, the trademark/trade name is used to identify/describe a hook and loop connection and, accordingly, the identification/description is indefinite.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. Claims 34-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Curtiss (Us 1,446,416).

Regarding claims 34, and 35, Curtiss discloses the claimed invention except the cover is cylindrical in shape and therefore does not have four defined sidewalls. Curtiss' method of protecting a plant from frost damage comprises first providing a cover 10 made of a fabric such as burlap (col.2, ln.2) which is resistant to frost but substantially allows air, water, and light to pass therethrough. The cover 10 further comprises a top wall defined as the lateral top portion, and further has an opening in the bottom through which a plant is passed therethrough. A drawstring 14 is provided to tighten and reduce the bottom opening. While Curtis does not positively disclose an embodiment wherein four sidewalls are shown, Curtiss notes that "minor changes in the size, form and construction of the various parts. . . may be made and substituted for those herein shown and described without departing from the spirit of my invention," (col.5, lns.31-37). It would have been obvious to one having ordinary skill in the art at the time the invention was made to change the shape or form of the cover, since it has been held that "there is no invention in merely changing the shape or form of an article without changing its function except in a design patent." *Eskimo Pie Corp. v. Levous et al.*, 3 USPQ 23.

Regarding claims 36-38, Curtis does not positively show alternate fasteners to the drawstring, however, the examiner takes Official Notice that an elastic band, or hook and loop fastener are considered art recognized equivalents for performing the same function. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use other types of fasteners that would be functionally equivalent to a drawstring, as such would not depart from the spirit of Curtiss' invention.

6. Claim 39 is rejected under 35 U.S.C. 103(a) as being unpatentable over Curtiss as applied to claim 34 above, and further in view of Andros et al. (US 5,956,923).

Curtis discloses the claimed method except he does not positively disclose covering a plurality of plants. Andros et al. teaches covering multiple plants, for example in a nursery or other agricultural mass-production facility. Covering multiple plants at once is well known in the art to be more time efficient to apply and remove only one cover from multiple trees or plants. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Curtiss' cover so that it may cover a plurality of plants in order to be more time efficient in a nursery-type environment.

7. Claims 21-26 and 28-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Curtiss as applied to claims 34-37 above, and further in view of Morrisoe (US 4,646,467).

Curtiss discloses the claimed invention, as discussed and modified above, except the cover material is not a spun bonded polypropylene. It is first noted that Curtiss' invention was disclosed in 1922, when such man-made fabrics were not available. In more recent years certain

polymer textiles became available to one in the art. Morrisoe discloses a weather protecting cover similar to Curtiss', and teaches fabricating it from a spun-bonded polypropylene textile because such textiles provide a more durable longer-lasting product (Morrisoe, col.1, ln.58 through col.2, ln.5). It would have been obvious to one having ordinary skill in the art at the time the invention was made to use a spun-bonded polypropylene fabric instead of burlap, in order to provide a more durable and dependable fabric.

8. Claims 27 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Curtiss in view of Morrisoe as applied to claims 21-26 and 28-32 above, and further in view of Andro et al.

Curtis, as modified, discloses the claimed method except he does not positively disclose covering a plurality of plants. Andros et al. teaches covering multiple plants, for example in a nursery or other agricultural mass-production facility. Covering multiple plants at once is well known in the art to be more time efficient to apply and remove only one cover from multiple trees or plants. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Curtiss' cover so that it may cover a plurality of plants in order to be more time efficient in a nursery-type environment.

Conclusion

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susan C. Alimenti whose telephone number is 571-272-6897. The examiner can normally be reached on Monday-Friday, 9am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Teri Luu can be reached on 571-272-7045. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

10. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Susan C. Alimenti

SUPERVISORY PATENT EXAMINER